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ABSTRACT

This paper takes a brief look at how several courts have interpreted the Education for All Handicapped Children Act, generally known as Public Law 94-142, and the Rehabilitation Act of 1973, generally referred to as Section 504. The questions under consideration include the right of an individual to sue under 94-142 and 504; the definition of the "least restrictive educational placement"; and disciplining the handicapped student. A summary of the current court decisions follows. (1) The law mandates that all handicapped be given a free appropriate education. (2) Parents have a right to sue if convinced that the public schools are not providing proper services to their child. (3) Should the school lose such a suit, the schools may be liable for attorneys' fees. (4) Handicapped children are expected to be provided as much interaction with nonhandicapped children as practical. (5) A handicapped child may not be disciplined by suspension or expulsion. (6) A child who is frequently disciplined may be judged a handicapped child. (7) All services required by the individualized educational program must be provided at public expense, including special therapy.
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THE COURTS AND THE HANDICAPPED AND PUBLIC SCHOOLS

Robert C. Von Brock

September 1, 1980 is the final date for complete compliance in programs and for total coverage in the education of handicapped children from ages 3 to 21 under the Education of the Handicapped Act, generally known as Public Law 94-142. Already there is building a body of case law regarding the role and function of the public schools in the educational programs for handicapped children. The stakes are high and the potential cost to schools in lost civil suits would seem to warrant some discussion of the court decisions that have been rendered relevant to this particular phase of our educational enterprise.

Public Law 94-142 did not come into being out of the clear blue sky. Two Federal District Court cases did much to bring to the attention of Congress a growing concern for the educational rights of handicapped children. A Federal District Court in Pennsylvania concluded: "Having undertaken to provide a free public education to all its children, including its exceptional children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training."[1] However, it was the United States District Court in Washington D.C. which set forth the basic framework of law which later became incorporated into Public Law 94-142. District Judge Waddy found that the District of Columbia failed to provide "publicly supported education and training to plaintiffs and other exceptional children" and was "excluding, suspending, expelling, reassigning, and transferring exceptional children from regular public school classes without due process of law." Judge Waddy was not impressed by the argument of the school board that it did not have the funds to improve the special education services of the District of Columbia unless Congress appropriated millions of additional dollars to the school district or that the school district would have to divert millions of dollars from funds already specifically appropriated by Congress for other educational services and that to do so would violate an Act of Congress. Said Judge Waddy,

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"---(T)he District of Columbia's interest in educating the excluded children clearly must outweight its interest in preserving its financial resources." The Judge then proceeded to outline the action which the school system was to take such as: 1. No child shall be excluded from school unless such child is provided "adequate alternative education services suited to the child's needs," 2. No suspension of more than two days without a hearing, 3. The school board shall utilize public or private agencies to evaluate the educational needs of all exceptional children, 4. The school board must file a comprehensive plan which provides for the identification, assessment, and placement of class members, such plan shall "describe the curriculum, educational objectives, teacher qualifications, and ancillary services for the publicly-supported educational programs to be provided to class members," and 5. The Judge provided for an impartial hearing process and the conditions and procedures necessary to such hearing.[2]

The Senate Report which accompanied the bill that was later to become the Education of the Handicapped Act referred to the two cases above and concluded that "it should not, however, be necessary for parents throughout the country to continue utilizing the courts to assure themselves a remedy._____ It can no longer be the policy of the Government merely to establish an unenforceable goal requiring all children to be in school. (This bill) takes positive necessary steps to ensure that the rights of children and their families are protected."[3]

At about the same time as 94-142 was developing, another legislative effort to protect the handicapped was passed. It became the final section of the Rehabilitation Act of 1973, Public Law 93-112 and is generally known and referred to as Section 504. Section 504 contains many of the provisions of 94-142 and is often used in conjunction with 94-142 in suits against school systems. One reason for this is that 504 has a clause which reads, "In any action or proceeding to enforce or charge a violation of this title, the court, in its discretion, may allow the

prevailing party --- a reasonable attorney's fee as part of the costs."[4] Obviously, this makes it more tempting for attorneys to take such cases, especially from families who couldn't afford instigating a suit against a school district. With this increased likelihood of suit, it behooves the schools to become familiar with the law and to do their best to comply.

It is not the intent nor within the scope of this paper to reiterate the specifics of 94-142 and 504. This information is readily available in a variety of publications. Rather, we are taking a brief look at how several courts have interpreted these laws in specific cases. The questions under consideration here include: 1. The right of an individual to sue under 94-142 and 504, 2. The definition of the "least restrictive educational placement, 3. Disciplining the handicapped student.

The Right Of An Individual To Sue

One of the defenses that schools have used when threatened with a suit is that individuals do not have a right to sue under the Federal statutes. They contend that it is the responsibility of the Federal agencies to investigate the complaints and bring action. However, citing a number of Federal cases, A Federal District Court in California summed up the matter thusly, "the defendant school district's basic contention appears to be that (its conduct) cannot be challenged by private action under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. #974. This argument is plainly mistaken. ------ All the circuit courts that have ruled on this issue have found such a right. ----- Plaintiffs' federal claims, <u>including that for damages</u>, are properly before this court." (Emphasis added)[5]

Therefore the handicapped individual not only has a right to sue but such suits may well include a claim for monetary damages.

Least Restrictive Alternative Placement

The word "mainstraming" does not appear in eith 94-142 or 504. However, both acts suggest that the purpose is to assist the handicapped child to "move toward

the mainstream of contemporary society." Specifically, the regulations implementing Public Law 94-142, section 121a.550 state, "Each State educational agency shall insure: (1) That to the maximum extent appropriate, handicapped children -- are educated with children who are not handicapped, and (2) ----(R)emoval of handicapped children from the regular educational environment occurs only when the nature of the handicap is such that education in regular classes with the use of supplemental aids and services cannot be achieved satisfactorily." Further section 121a.552 continues, "In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services he or she needs."

The requirement for providing opportunities for handicapped and non-handicapped to interact and socialize with each other carries over from the academic to the non-academic settings. Section 121a553 specificies that "(in) providing or arranging for the provision of non-academic and extra curricular services and activities, including meals, recess periods and (other) services and activities --- each public agency shall insure that each handicapped child participates with non-handicapped children in those services and activities to the maximum extent appropriate to the needs of the child."

The regulation implementing Section 504, section 84.34, reads somewhat the same as quoted above. One can deduce that Congressional intent is to provide as much contact between the handicapped and non-handicapped as possible. The courts have carried forth this intent consistently.

In West Virginia a student with spina bifida was left with the inability to control the bowels and with a noticeable limp. The school would not allow the child to attend the regular classroom unless the mother came to school several times a day to care for the child. The child was of normal intelligence and

physically able to perform in a classroom setting. The Federal District Court ruled that, "The exclusion of a minimally handicapped child from a regular public classroom situation without a bona fide educational reason is a violation of (Federal statutes). ------School officials must make every effort to include such children in the regular public classroom situation, even at great expense to the school system."[6]

A more striking case where the court held to keeping handicapped children in a public school setting occured in New York. The school board identified fifty pupils in special education programs who were carriers of hepatitis B. The school board ordered the carriers to be excluded from the public schools. Said the District Court, "Based on the evidence we have heard, we find the risk of contagion of hepatitis B among mentally retarded children is not substantial enough to justify their discriminatory exclusion from public school. The risk of contagion cannot be ignored, but there are phylactic measures ------ which can be taken in order to reduce the risks to a de minimus level. It is not necessary to close the school house door to these children."[7]

A Texas case highlights the court decisions regarding handicapped children and extracurricular activities. John Doe, a student recently transferred to another school was declared ineligible by the interscholastic league to participate in interscholastic football. Said the District Court, "John Doe, because of his severe psychiatric difficulties, has a genuine, compelling need to participate in interscholastic football, and denying him this right, under the circumstances, would create irreparable harm. Participation in athletics during his senior year could mean the difference between John Doe's growing up as a normal, productive adult as distinguished from the possibility of his being institutionalized for the rest of his life." In granting an injunction against the interscholastic league, the Court concluded, "The Court --- must balance the harm which will be inflicted on

the plaintiff (Doe) if relief is not granted against the harm which will be visited upon the defendants. ----- (T)he balancing task is easy. ---- Denying this young man and his parents the right to individualized treatment which the law mandates, is a severe deprivation. No harm is visited on the (interscholastic league), in this Court's view, by the preliminary injunction."[8]

While one must keep in mind that litigation is still in an embroyonic stage, and future, higher court decisions may well alter the picture, it certainly appears at this point that schools will have a difficult time justifying the exclusion of handicapped students from frequent contact with the non-handicapped. It also seems likely that schools will have to reconsider many of their normal procedures and teaching techniques in the classroom.

Discipline and the Handicapped

The courts have interpreted 94-142 to carry special restrictings on the discipline of handicapped children. In 1978 The Federal District Court in Conn. held that an expulsion of a handicapped child constituted a change in placement and could not be accomplished without a revision of the "individualized education program" plan.[9]

A District Court in New York ruled that a handicapped child cannot be suspended where the school did not provide "related aids and services.[10]

A Federal Court in Indiana differentiated the legitimacy for expulsion of the handicapped based on the reason for the expulsion. If the disruptive behavior which led to the expulsion stemmed directly as a result of the handicap, the student may not be expelled but placed in an appropriate program. On the other hand, if the behavior is not the result of the handicap, the student could be expelled.[11]

However, perhaps the most far-reaching decision in terms of what a school may or may not do in the disciplining of a handicapped student, is in the Consent Decree issued by the Federal District Court in Connecticut. This decree not only established that the Federal regulations concerning placement of handicapped children shall replace state and local policies but also mandates that "Any child who is not referred or identified (as handicapped) but who has been suspended for more than 15 days in any school year, or is recommended for expulsion --- shall be referred to an SST (Student Study Team) to determine whether that child should be evaluated and referred to a PAT (Pupil Appraisal Team) ..... (When such) a child is determined to be handicapped and in need of special education the special education process will take place in lieu of the discipline process."[12]

In other words, if a child is a serious discipline problem in school he/she may well be considered a handicapped child and therefore require a specialized, appropriate educational program.

Conclusion

To sum up the current court decisions we find that:

1. The Law mandates that all handicapped be given a free appropriate education.
2. Parents have a right to sue if convinced that the public schools are not providing proper services to their child.
3. Should the school lose such a suit, the schools may be liable for attorney's fees.
4. Handicapped children are expected to be provided as much interaction with non-handicapped children as practical.
5. Handicapped child may not be disciplined by suspension or expulsion.
6. A Child who is frequently disciplined may be judged a handicapped child.
7. All services required by the individualized educational program must be provided at public expence, including special therapy.

On June 25, 1980, in a 6-3 decision, the United States Supreme Court broadened its interpretation of the liability of 42 U.S.C. 1983. This congressional act provides that anyone who, under the color of state statute, regulation, or custom, deprives another person of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the injured party.

In the past, while school boards have been considered to be "persons" by the courts, the liability has been limited to actions which were in violation of a persons constitutional rights. In this decision, however, the Court has expanded the application of 1983 beyond the protection of constitutional rights and now protects individuals against violations of all federal laws by state and local officials. The Court also pointed out that the Civil Rights Attorney's Fees Awards Act applies to Section 1983 cases.

In his dissent, which was joined by Chief Justice Burger and Justice Rehenquist, Justice Powell predicted, "In practical effect, today's decision means that state and local governments, officers, and employers may now face liability whenever a person believes he has been injured by the administration of any state-federal cooperative program, whether or not that program is related to equal or civil rights."[13]

If school districts are reluctant to fully implement 94-142 because of the additional cost, they might well consider the alternative. If sued successfully, they will not only be required to institute the program but may have to pay the attorney's fees of the plaintiff, the cost of prior special services if borne by the plaintiff, and now damages as well. Economic reasons alone should be enough to spur school systems to make every effort to know and comply with the Education of the Handicapped Act.

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1. Pennsylvania Association for Retarded Children v. Commonwealth, 344 F. Supp. 1257 (E.D. Pa. 1971)

2. Mills v. Board of Education, District of Columbia, 348 F. Supp. 866 (D.C. 1972)

3. Senate Report 94-168, June 2, 1975

4. Public Law 95-602, Section 794a

5. Boxall v. Sequoia Union High School, 464 F. Supp. 1104 (N.D. Cal. 1979)

6. Hairston v. Drosick, 423 F. Supp. 180 (S.D.W. Va. 1976)

7. New York State Association for Retarded Children v. Carey, 466 F. Supp. 479 (E.D.N.Y. 1978) Affirmed 612 F.2d. 644

8. Doe v. Marshall, 459 F. Supp. 1190 (S.D. Tex. 1978)

9. Stuart v. Nappi, 443 F. Supp. 1235 (D. Conn. 1978)

10. Sherry v. New York State Education Department, 479 F. Supp. 1328 (W.D. N.Y. 1979)

11. Doe v. Koger, 480. F. Supp. 225 (N.D. Ind. 1979)

12. P-1 v. Shedd, No. 78-58 (D. Conn. March 23, 1979)

13. Maine v. Thiboutot, 48 U.S.LW 4859 (June 25, 1980)